

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

BLACHLY-LANE ELECTRICAL
COOPERATIVE,

Employer

and

Case 36-RC-6496

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 659

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, ("the Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

I. SUMMARY

Petitioner filed the instant petition seeking to represent 13 employees employed by the Employer and working in the Operations Service Department at its Eugene, Oregon facilities.³ The Employer is an electrical cooperative engaged in the business of providing electrical services to its members, mostly residential customers in a rural area of Lane County, Oregon.

The primary issue in this proceeding is whether the line foreman and right-of-way foreman should be included in the unit. The Employer contends that both foreman positions possess the authority to assign, responsibly direct, evaluate, grant time off, effectively recommend hire, discipline, and discharge, and/or adjust grievances, and, thus, fall within the definition of supervisor as the term is defined in Section 2(11) of the Act. Petitioner

¹ The Employer and the Petitioner timely filed briefs, which were duly considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

³ Specifically, the petitioned-for-unit includes the positions of working line foreman ("line foreman"), working right-of-way foreman (lineman) ("right-of-way foreman"), serviceman, journeyman lineman, apprentice lineman, groundsman, engineering tech/estimator, journeyman tree trimmer, tree trimmer apprentice, brusher/groundsman, mechanic/equipment operator, and groundskeeper. The documentary evidence in the record indicates that the right-of-way foreman position is referred to as the working right-of-way foreman (lineman), but will be referred to as the right-of-way foreman throughout this decision.

contends neither foreman position possesses indicia of supervisory authority and, therefore, both are properly included in the unit.

Based on the record evidence and the parties' arguments at hearing and in their respective briefs, I conclude that the Employer has carried its burden of establishing that both foreman positions possess indicia of supervisory authority, specifically the authority to responsibly direct. Accordingly, I am directing an election in a unit, described below, which excludes the line foreman and right-of-way foreman.

In the following section, I have set forth the relevant record evidence describing the Employer's operations and the purported supervisory authority of both foreman positions. Following that section, I have set forth an analysis of the Board's legal standards for determining supervisory status and the application of those standards in this case before me. Thereafter, I have set forth the details of the directed election and the procedures for requesting review of this decision.

II. RECORD EVIDENCE⁴

A. Background on the Employer's Operations

The Employer is an electrical cooperative that provides services currently to about 3,500 members, the vast majority of which are residential customers in rural Lane County, Oregon. In general, the Employer operates by purchasing wholesale power and reselling it to its members. The record reveals that the Employer has about 400 electrical facilities and about 472 miles⁵ of power line. The Employer's physical premises consist of a parking garage, warehouse, and office facilities.

The General Manager is responsible for the overall management of the Employer's operations. Bud Tracy is the current General Manager and has held this position since 2003. The Operations Department involved in this proceeding is led by the Operations Manager. At hearing, the parties stipulated that Matt Smith is the current Operations Manager/Interim Operations Manager and is also performing duties that were previously assigned to the purchasing agent/dispatcher/lineman position. Directly below the Operations Manager are the line foreman, engineering technician, safety coordinator, and the right-of-way foreman.⁶

Currently, the right-of-way foreman is Kevin DeBates ("DeBates"), who has occupied that position for about 8 years, and has been employed at the Employer for approximately

⁴ At the hearing, General Manager Bud Tracy testified for the Employer. Right-of-way foreman Kevin DeBates, line foreman Kris Myers, journeyman lineman Ken Gast, and serviceman (former line foreman) Tim Cacan testified for the Petitioner.

⁵ After the parties filed their post-hearing briefs, the parties stipulated that the Employer's brief mistakenly stated that it maintains 72 miles of electrical lines in Lane County, Oregon, when it should have stated that it maintains 472 miles of electrical lines in Lane County, Oregon.

⁶ The parties stipulated that the Operations Manager should be excluded from the unit because he has the authority to hire, fire, discipline, and exercise other supervisory authority under Section 2(11) of the Act. The parties further stipulated that the position of safety coordinator should be excluded from the unit, as it does not share a sufficient community of interest with the unit employees. The parties also stipulated that the engineering technician should be included in the Unit. In light of the foregoing and the record as a whole, I shall exclude the Operations Manager and the safety coordinator and shall include the engineering technician in the unit.

31 years.⁷ While Debates did not receive any specific training to become a foreman, he did receive additional training after he became a foreman. DeBates has a present crew that includes three journeyman tree trimmers. This crew is responsible for maintaining rights of way along the Employer's electrical facilities, including keeping trees from interfering and coming into contact with power lines. They trim back trees along sections of lines using pre-determined maintenance schedules that are drafted on an annual budgetary basis. The right-of-way foreman participates in developing this annual maintenance schedule by providing input to the Operations Manager to determine where to clear vegetation annually. This input occurs during the annual budgeting process. However, the nature and extent of the impact that the right-of-way foreman's input has on this budgeting process and any specific work scheduling, is not concretely detailed in the record. Regardless, the right-of-way crew's work is primarily determined by the Operations Manager disseminating the work to the right-of-way foreman, who shares it with the crew.

Kris Myers ("Myers") has been the line foreman for about 2 ½ years and has worked for the Employer for a total of about 21 years. Myers did not receive specific training to become a foreman, but he received additional training after he became a foreman. Myers has a current crew that consists of two journeyman lineman and one apprentice lineman. This crew is responsible for constructing and maintaining the Employer's power lines, including building new lines and repairing old lines. The line crew receives work assignments through job packets the Operations Manager or engineering technician place in the line foreman's job box. Some of these work assignments, mostly from the engineering technician, contain deadlines by which the jobs must be completed, but most of the jobs do not have such deadlines. Myers receives these job packets about every couple of days, which determines the crew's workload until they complete the assignments.

Both crews have shift hours that are generally from 7 a.m. to 3:30 p.m., with adjustments from 6 a.m. to 6 p.m., based on fire danger, weather, daylight savings time, and decisions made by federal administrative agencies such as the Forest Service and the Bureau of Land Management. Both foremen coordinate and communicate with each other to affect temporary day-to-day transfers according to the needs of each crew. When such temporary transfers have been brought to the Operation Manager's attention, he has stopped them on occasion. For example, on one occasion, the two crews were going to work together, but the Operations Manager directed the line crew to work in the substation at the office instead.

At the start of each job, each crew holds what is referred to as a "tailgate" or "tailboard" meeting ("tailgate meeting"), to give the crews a roadmap for what work needs to be accomplished that day, including discussions on how the work should be done, what equipment should be used, and ensuring that the crew remains safe. The record indicates the Operations Manager could be involved in the tailgate meetings, but generally only just the foremen and their crews attend. Although both foremen typically conduct the tailgate meetings, at times, the crews will rotate who leads the meetings. Anyone on the crews can make recommendations about how the work should be performed, and the crews generally reach a consensus on the best recommendations to follow. However, the foremen retain final authority about how work should be done and how to perform the jobs safely. The

⁷ Both foremen have a crew of four, which include the foreman positions.

record reflects that the Operations Manager only visits the field approximately one to three times per month and observes the crews perform the respective jobs.

B. Right-of-Way Foreman and Line Foreman Duties and Responsibilities

1. Overview

The record contains an October 22, 2002, job description for the right-of-way foreman and an undated job description for the line foreman, which are undisputedly accurate characterizations of the duties and responsibilities of the positions.⁸ The right-of-way foreman is responsible for the Employer's vegetation management program, including maintaining adequate clearances on all right-of-ways throughout the Employer's service area, and for the safety of the Employer's employees and the public. The line foreman is under the general supervision of the Operations Manager and is responsible for supervising line construction, operation, and maintenance throughout the Employer's service area.

Further, both foreman job descriptions are quite similar and state that the foremen are responsible for: planning tailgate meetings and safety discussions necessary to carry out assigned work in an efficient manner; maintaining the quality and quantity of all work performed by subordinate employees; training subordinate employees in all phases of their assigned work; interviewing selected applicants for job openings and making recommendations to the Operations Manager regarding final selections; continuously evaluating the performance of subordinate employees and for making appropriate recommendations for training or replacement of any employees unable or unwilling to perform assigned duties; continually and critically reviewing all work methods, procedures, to discover improvements and making recommendations for such improvements; and knowing and understanding the Employer's policies in the course of performing all assigned functions.

Both job descriptions also state that the foremen are responsible for effecting proper and only authorized use of any vehicle and/or other equipment and tools assigned to their crews, including minor maintenance, and reporting to the Operations Manager any maintenance to keep tools and equipment in good working condition. Both foremen are also responsible for knowing, understanding, and personally performing all duties in accordance with accepted safety rules, regulations, practices, and being sure all such standards are carried out by their crews. Further, both foremen are responsible for knowing and keeping current on all policies and procedures, including those of the National Electric Safety Code, Oregon Department of Forestry, and other authorities relating to the foreman's assigned duties, and for clearly and accurately interpreting and communicating these policies and procedures to members, employees, and others, as circumstances require. The foremen must also maintain harmonious relations with their crews, other supervisors, employees, members, and the general public and should have a thorough knowledge of the entire distribution system, such as location of lines, voltages, sources of power, direction of feeds, extent or approximate amount of load carried by each metering point, the relative importance of one line to another, and location of breakers. In this regard, both foremen must be able to read and interpret maps for others and must recommend changes in crew make-up necessary to meet the changing functions and activities of their crews.

⁸ Right-of-way foreman DeBates and line foreman Myers testified that the job descriptions for their respective positions accurately described their day-to-day duties.

The right-of-way foreman is additionally responsible for creating and facilitating a vegetation management plan that: insures an efficient and effective trim cycle and use of the right-of way equipment and personnel; addresses all trouble areas with the assistance of the engineering technician; provides an effective mapping tool, graphically representing the vegetation management plan; and creates effective budgeting assistance.

The line foreman is also responsible, on the basis of written orders and applicable sketches prepared by engineering, for performing or supervising construction and maintenance work on the Employer's system. Further, the line foreman is responsible for directing and following through on line matters essential to the operation and maintenance of the Employer's service throughout the service area. Additionally, the line foreman is responsible for the proper care, use, handling, protection, and accountability of any materials issued to him or his subordinates for specific jobs, for trucks or any other inventories, and for the accuracy of all reports as to the use of such materials. The line foreman also has responsibility for the proper care and return to the warehouse of all unused, surplus, and/or retired materials, and is responsible for informing the Operations Manager of supplies and materials required.

The record reveals the right-of-way foreman performs journeyman tree trimmer work about 10% of the time and spends 80-90% of the day coordinating work, including communicating with consumers; monitoring safety; and overseeing the crew's work. The right-of-way foreman receives 5% more pay than a journeyman but both receive the same benefits. If the right-of-way foreman is gone for the full day, he will appoint a substitute foreman who will be upgraded to a higher pay scale than a tree trimmer; the precise amount of the higher pay is not clear from the record. DeBates testified he usually designates his substitute based on seniority and performance.

The line foreman performs journeyman lineman work about 90-95% of the time. The line foreman receives 14% more in wages than a journeyman lineman, but the same benefits as the linemen. If the line foreman is gone for the full day, he will appoint a substitute foreman who will be upgraded to an unspecified higher pay rate than received by journeymen lineman. Myers testified he usually designates his substitute by rotating between the two journeymen linemen, and, at times, the Operations Manager will appoint a substitute. The record further reveals that substitutes for both foremen will not receive higher pay if the substitution is for less than a full day.

2. Assign

The record evidence shows that the both the lineman crew and the right-of-way crew have shifts and locations assigned by the Employer rather than the foremen. Those shifts are noted above and generally have fixed starting times, subject to change based on the weather or the directives from administrative agencies. The locations and work priorities are generally dictated by the Operations Manager or engineering technician, based on the Employer's work plan and what jobs need to be completed and are communicated to the foremen to disseminate to their crews. However, the record reveals that both foremen play a role in assigning the respective crews their daily overall tasks.

DeBates, the current right-of-way foreman, testified that the vast majority of the time, his right-of-way crew knows how to do the job and understands the work. He estimated that about 80% of the time, his crew knows what to do, and about 20% of the time, they need direction about what to do. DeBates further testified that if a task is more difficult, then the right-of-way crew will talk about it before they attempt it, as a group, and decide how to

perform the task. DeBates testified that about 30% of the time, the group chooses how to perform the work, but ultimately, it is his decision and responsibility regarding how to proceed.

According to Myers, the current line foreman, the journeyman linemen do not need specific instruction about how to do the job, and estimated that about 20-25% of their work is so familiar it does not require any instruction. Myers further testified that the tailgate meetings will typically address any unique issues to the job. In addition, Myers testified that sometimes the crew will select the tasks they will perform themselves.

Journeyman linemen Ken Gast, who is on Myers' line crew, testified that he has worked for the Employer for 11 years, including experience as a journeyman tree trimmer and time substituting as the line foreman. According to Gast, the line crew's work is outlined in a tailgate meeting in the morning, in which everyone on the crew picks and chooses what they want to do. With respect to who runs the tailgate meetings, Gast testified that the line foreman is responsible for them and usually runs them, but it is not uncommon for the crew to rotate who leads the meetings. Gast further testified that about 80% of their daily tasks are repetitive, in which everyone on the crew knows the steps.

Employee Tim Cacan testified he has worked for the Employer for 32 years, including approximately 12 or 15 years as the line foreman and most recently for about 2 ½ years as the serviceman.⁹ With respect to assignment of work as the line foreman, Cacan testified that he received the job packets from the Operations Manager or engineering technician and would hold a tailgate meeting with his crew. When Cacan was line foreman, he used a team effort to determine how the work would be accomplished, including having his crew rotate who led the tailgate meetings and letting the crew decide who would perform what task. According to Cacan, the crew was trained and knew how to do the job and stay safe. Cacan testified that as line foreman, he did journeyman lineman work about 85% of the time.

Regarding overtime, the record further reveals that there are generally three different circumstances when overtime is available to both crews. First, the Employer maintains an on-call list whereby each journeyman lineman volunteers to be on call for a week, from Thursday until Thursday. The lineman is paid overtime consisting of double regular wages for working on-call and may make the sole determination of the quantity and type of employees he needs to accomplish the on-call work. Second, the Employer has scheduled outages which might result in overtime, which is controlled entirely by the Employer. Third, overtime can be authorized after hours for unfinished work for unfinished work. The record reveals in the third circumstance, the foremen will ask their crews if they are willing to work late to finish the job. The regularity and frequency of overtime was not detailed in the record by testimony or payroll records.

3. Responsibly Direct

There is no question that both foremen have crews under them maintaining the Employer's rights-of-way and power lines. As for whether the foremen decide what job shall

⁹ A serviceman is responsible for meter testing, installing meter instruments, repairing items on daily trouble orders, locating services, inspecting substations, limited staking, acquiring data for load studies and energy diversion, performing service connects and disconnects, assisting accounts receivable with collections, and rechecking meter readings.

be undertaken next and who shall do it, DeBates, the current right-of-way foreman, testified he assigns his crew members with daily tasks based on their skills, even though the skill set is fairly evenly matched among his crew, as well as what his crew members want to do or need to do to gain experience. However, DeBates offered that most of his crews' directions come from specific consumer requests, Employer policies and procedures, and safety guidelines.

Myers, the current line foreman, testified he assigns line crew members with daily tasks based on the crew member's respective experience levels. Myers testified he tries to get the least experienced crew member, the apprentice lineman, "up in the air" performing the line work most of the time so he gains experience, and rotates between the journeyman lineman and himself to accompany the apprentice. Myers further testified that when he does have to give directions to the crew, he assesses the relative experience level of the crew and their knowledge of the system.¹⁰ For example, Myers testified that one journeyman lineman has more seniority and more experience, so it is easier for Myers to describe the work and send him to accomplish it than his less senior, less experienced counterpart. Myers also mentioned an example of choosing one employee over another to do backhoe work job based on his past observation of the way in which employees had performed that work.¹¹

Gast, a journeyman lineman, testified that the line foreman decides who will do the work on the crew, what equipment will be used, and is responsible for the safety of the crew and seeing that the job is done correctly. Gast also testified that the crew takes turns going "up in the air," and that the journeyman linemen or foreman direct the apprentice lineman's work, since he needs the training and oversight.

As for whether the foremen "responsibly" direct their crews, as noted above, both foreman's position descriptions state that they are responsible for the quality and quantity of all work performed or handled by subordinate employees. In this regard, the record reveals that around June 24, 2008, the right-of-way foreman was issued a 1st Written Warning regarding an injury accident that occurred on November 14, 2007, resulting in a citation issued by Oregon OSHA on April 11, 2008. DeBates testified that the incident involved a crew member cutting a tree which fell on DeBates, injuring him. The warning states, "The findings of Oregon OSHA indicate in their citation specific evidence that you failed to carry out job duties and responsibilities under your supervision. These responsibilities are consistent with your job description and Blachly-Lane's safety policy..." The warning further provides, "As a front line supervisor it is imperative to the company, to your co-workers, and to the public that work operations are always conducted in a safe and efficient manner. Because of the severity of this accident and in order to assure that you are exercising your responsibility consistently, this warning is issued to assure operations under your control will be conducted in such a manner as to avoid any future accidents."

As noted above, both foremen's job descriptions also state, *inter alia*, that they are responsible for: planning tailgate meetings and safety discussions and training subordinate

¹⁰ Additionally, Meyers testified that he generally does not refer to policies and/or procedures once out at the jobsite. Rather, he relies on his years of experience to guide him through his workday duties and responsibilities.

¹¹ While not fully detailed in the record, it appears that the line and right of way crews use various types of equipment in their work, as well can be imagined in accessing power lines and removing vegetation, including trees, from power sources.

employees in their work. The record contains a July 9, 2009, job evaluation for right-of-way foreman DeBates, signed by DeBates and the Operations Manager. This evaluation states that DeBates is a "good crew leader" and that "work is always well lined out by Kevin [DeBates]." DeBates testified his performance is reviewed annually by the Operations Manager, including evaluations of the quality of the work his crew produces, his crew's safety practices, his handling of customer complaints, and for resolving problems among his crew.

The record also contains an August 10, 2009, job evaluation for line foreman Myers, signed by Myers and the Operations Manager that states Myers should "continue to grow in crew leadership," should "work on being candid with crew members to improve performance," that he should "continue to improve on the work planning process, laying out work in advance," and that "Kris [Myers] enjoys running the crew." Myers testified he gets evaluated annually by the Operations Manager, regarding how well he is performing the duties outlined in his position description. However, the record does not contain any concrete evidence showing that Myers has suffered adverse consequences for failing to properly direct the crew. In fact, Gast, one of the journeyman linemen on Myers' crew, testified that he could not think of an instance in which there was dissatisfaction with the line crew's work and someone was held responsible for it.

4. Evaluate

The record reveals that both foremen annually evaluate their crew members, including signing these evaluations as the employee's "supervisor." No one else on their crews does such evaluations. However, the record lacks any concrete evidence that these evaluations have been used to issue merit increases or promotions from one level to another or result in any other impact on job status. Specifically, DeBates testified that the evaluations have not been used to issue merit increases or promotions from one level to another. Myers testified that he has no direct knowledge about how promotions work at the Employer.

The General Manager provided conclusory testimony that once the foremen sign the employee evaluations, they turn them in to the Operations Manager, who uses the evaluations as a tool to determine if the evaluated employee will progress or receive a merit increase if performance is exceptional. However, the General Manager did not even know if the Operations Manager seeks input from or discusses the evaluations with the foremen before the evaluations are placed in an employee's file. Further, with respect to apprentices, the General Manager acknowledged that apprentices receive step increases in pay based not only on their foreman's evaluation, but also regarding whether they have met the time and scholastic requirements of the JATC program.¹² The General Manager testified that the foreman's evaluations have not been used to demote crew members, but some have been frozen at a certain level until their performance improved. The General Manager also testified that no monetary awards can result from a positive evaluation from a foreman, as monetary rewards are tied to the wage scale associated with a particular crew level or period.

¹² The record indicates that it is the JATC and not the Employer, which ultimately advances employees through some form of a certification process. Further, apparently, the evaluations play some role in that process but the details and concrete examples are lacking in the record.

There is no record evidence regarding the factors the Operations Manager considers when making promotion or merit increase decisions, the extent to which he relies upon the evaluations completed by the foremen and/or whether the Operations Manager conducts his own independent investigation. Indeed, the record contains no documentary evidence regarding promotions or merit increases whatsoever.

5. Approving or Denying Leave Requests

The record reveals that both foremen have the authority to grant or deny leave requests without getting approval to do so, signing such requests as the "supervisor" of the employees, and then turning in the requests to the Operations Manager. As for denying leave requests, DeBates testified he might have to deny leave requests for scheduling or safety reasons. Myers testified that the factors he uses to determine whether to approve or deny a leave request include the crews' job schedules and whether or not the crew needs the person available for the period requested.¹³ However, the record contains no concrete evidence of how the foremen exercise their purported discretion regarding approving or denying leave requests or that either foreman has actually denied any leave requests.

In addition, the record is clear that the Operations Manager and HR Manager play some role regarding the leave requests after the foremen approve or deny them, but fails to detail what their respective roles entail. With respect to requests for family leave, the record reflects the General Manager must approve these requests. The General Manager testified that once he receives the approved family leave request from the foreman, he will consult with the payroll clerk, not the requesting employee or the foreman, to authenticate the need for family leave.

6. Effectively Recommending Hire, Discipline, Discharge¹⁴

a. Background

Both foremen's job descriptions, documented warnings, and testimony reveal that the foremen do have some role in recommending hire, discipline, and discharge. Specifically, both foremen's job descriptions state they are responsible for: interviewing applicants for job openings and making recommendations to the Operations Manager

¹³ Myers testified that he was only questioned by Employer management on two different occasions regarding leave requests, out of approximately 100 leave requests he had approved during his foreman tenure. First, about 4 months ago, one of his crew members (Ken Gast) requested vacation for 2 weeks, and Myers approved it as his supervisor. Gast testified that the Operations Manager later approached him and asked if he needed that much vacation, stating a concern about upcoming projects for the Employer. Gast ended up taking the 2 weeks vacation, so the Operations Manager did not deny the request. Second, about 2 or 3 months ago, Myers approved family sick leave for a crew member to attend a grandparent's funeral. However, Myers testified that either the Operations Manager or the HR Manager told him that the employee could not take family sick leave to attend a grandparent's funeral, as it was not immediate family, so the leave classification must change to a vacation request.

¹⁴ Regarding Myers, the record reflects that he has not been involved in any part of hiring, has never been told by management what, if any, responsibility he has for hiring, has never made a recommendation to hire or discharge, and has not been involved in or recommended any discipline. Myers testified that he has no independent authority to suspend or discipline, and that he can only make recommendations. However, I note that Myers has only occupied his foreman position for 2 ½ years and in that time, the Employer's workforce has been stable. Moreover, as detailed above, Myers' job description clearly states that he has the authority to interview applicants and make hiring, firing, and/or training recommendations.

regarding final selection, and continually evaluating performance of subordinates and for making recommendations regarding training or replacement of employees with performance issues. The record also reveals that the Employer apparently has a progressive disciplinary system, but contains no specifics about how the system works.

I note that the General Manager testified that the Employer's workforce has been stable and there has not been much hiring or firing since 2003, when his employment began. The General Manager testified that only 4 or 5 total employees have been hired to work on the line crew and the right-of-way crew during his tenure. With respect to discharge, the General Manager testified that he fired one employee from the right-of-way crew (detailed below) and one engineering technician since he became General Manager.

b. Hire

To explain the Employer's hiring process, the General Manager gave a hypothetical example of hiring a tree trimmer. The General Manager testified that if the right-of-way foreman requested to hire a tree trimmer for his crew, the General Manager would make the decision to approve the recommendation to advertise opening and then fill the position. According to the General Manager, the right-of-way foreman would review the applications, recommend individuals to be interviewed for the position, and participate in the interviewing process to arrive at a final recommendation to hire.¹⁵ The General Manager testified that the foreman, the Operations Manager, and possibly the purchasing agent/dispatcher/lineman and HR Manager would be involved in interviewing the applicants and making either four individual recommendations or a consensus recommendation about which candidate to hire. The General Manager acknowledged that the ultimate hiring decision is a joint decision he makes along with the HR Manager and Operations Manager.

The record reveals that DeBates has been involved in interviews for two hires, as a member of a four-person interview panel, along with the HR Manager, Operations Manager, and the purchasing agent/dispatcher/lineman. DeBates testified that he has never made an individual recommendation to hire; rather, the panel makes a group recommendation, with equal weight given to each interview panel participant's recommendation. DeBates also testified that he has not recommended anyone that was not hired, and that the hiring decisions are ultimately made by the General Manager, the Operations Manager, and the HR Manager, based on the panel's recommendation.

As to whether the panel's recommendations are followed, the General Manager testified that the panel makes recommendations about whom to hire, but the foreman's recommendation is the most germane, although the record fails to detail the General Manager's rationale in this regard. I note that the record contains no evidence that any individual panel member has veto power to overrule the panel's hiring recommendation. Moreover, the record fails to provide any evidence regarding whether the panel and/or the foreman's hiring recommendation is followed without any independent investigation during the subsequent review by upper management following the interviews/recommendation. In fact, the record is devoid of any evidence regarding the roles of the General Manager,

¹⁵ With respect to the actual interview, the Employer's HR Manager provides the interviewers with a set of questions to be asked each applicant. The interviewers record and assign a numerical score to the responses to the questions. Following the interviews, the scores are tallied and the interview panel attempts to reach a consensus on the applicant to recommend.

Operations Manager, and HR Manager when making hiring decisions following the panel's recommendations.

c. Discipline¹⁶

With respect to discipline, the record contains documentary evidence that DeBates signed a written warning dated December 30, 2002, as "supervisor," issued to a crew member for reporting to work late. According to DeBates, he and the Operations Manager decided to give the employee a written warning. DeBates testified that the Operations Manager told him to give the crew member this warning as a "2nd Written Warning," because the employee had prior incidents before DeBates took over the foreman position. I note that this 2nd Written Warning is also signed by the employee, the Operations Manager and the HR Manager.

The General Manager testified that DeBates signed another written warning as "supervisor" since 2003, but the record otherwise contains no specific testimony or documentary evidence regarding this discipline or any other discipline purportedly issued by DeBates for that matter. DeBates testified that he has the authority to discipline or suspend employees without prior approval from anyone. However, DeBates testified he has never exercised his purported authority to suspend, but he has issued employees written warnings, through the progressive disciplinary process. The General Manager testified that he reviews all discipline before it is issued, but the record contains no evidence of the factors he takes into consideration regarding the discipline, or whether he engages in any independent investigation and/or generally follows the recommendation of his subordinates.

d. Discharge

As for discharge, the record shows that only one employee has been terminated from either crew since the current General Manager started in 2003. That discharged employee, "R.N.," apparently caused the November 17, 2007, injury accident that resulted in DeBates receiving a 1st Written Warning dated June 24, 2008.¹⁷ DeBates testified that prior to the injury accident, he recommended to the Operations Manager that R.N. be terminated, due to several prior incidents involving R.N. However, the record reflects the Employer did not follow DeBates' recommendation. In fact, according to testimony from the General Manager and DeBates, R.N. only received a written warning for causing the injury accident and was not terminated until after he had accrued subsequent incidents. No documentation of R.N.'s discipline or termination was introduced in the record, and it is clear from the testimony of DeBates and the General Manager, that the discipline and terminations involved the Operations Manager and the General Manager, but the details of their respective roles in this regard are also absent from the record.

7. Adjusting Grievances

The General Manager testified that the Employer's procedure for employee complaints is for employees to first seek resolution from their supervisors. According to the General Manager's conclusory testimony, the crews should therefore go to the foremen with their complaints, and the foremen have the authority to resolve those complaints. However,

¹⁶ Current serviceman and former line foreman Cacan testified that, as a line foreman, he never disciplined anyone nor issued any written or verbal discipline. Further, Cacan testified he was never told by anyone in management that he had the authority to discipline employees.

¹⁷ "R.N." was how the employee was identified in the record, to provide anonymity to a degree.

DeBates testified he has not participated in handling disputes between crew members and management and has never made any recommendation with respect to such disputes. Likewise, Myers testified that he was unaware of and did not participate in any disputes between his crew and management. The record contains no examples of the foremen exercising independent judgment over any crew members' grievances, and fails to give concrete examples of any types of grievances or adjustments, in which the foremen have played a role.

8. Secondary Indicia

The Employer's hierarchy relevant to this proceeding is as follows: The General Manager is responsible for the overall management of the Employer's operations. The Operations Department involved in this proceeding is led by the Operations Manager. Directly below the Operations Manager are the Line Foreman, Engineering Technician, Safety Coordinator, and the Right-of-Way Foreman. Each foreman has three employees on his crew. Thus, for each, the ratio of foreman to crew members is 1 to 3. The foremen also perform crew work during a portion of their workdays, but, as stated earlier, testimony discloses that such work varies from about 10% of the time for the right-of-way foreman and about 90-95% of the time for the line foreman. Regardless, it is clear that the foremen do perform crew work and also spend time on other matters such as representing the Employer in dealings with its customers and preparing paperwork documenting hours worked by their crews.

Although both foremen have the same benefits as the other employees, the line foreman makes 14% more and the right-of-way foreman makes 5% more in wages than a journeyman lineman. While no longer a foreman, Cacan continues to receive the higher pay of a foreman but the General Manager testified Cacan's greater pay was due to the serviceman work functions performed by him in addition to journeyman lineman duties. The record also reveals that, unlike their crew members, both foremen have desks and computer access at the Employer's office, have Employer-provided cell phones with higher allowances than crew members, and have access to an Employer vehicle while at work.¹⁸

III. ANALYSIS

A. General Legal Standards

The record evidence and the parties raise one primary issue as to the supervisory status of the right-of-way foreman and the line foreman. The Employer contends that the foremen possess indicia of supervisory authority, as they have the authority to assign, responsibly direct, evaluate, approve or deny leave requests, and effectively recommend hire, discipline, and discharge, as defined in Section 2(11) of the Act. Accordingly, the Employer claims both foreman positions should be excluded from the unit. Petitioner argues that foremen do not possess such authority and are properly included in the appropriate unit.

Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

¹⁸ The foremen may not take the trucks home after work. Also, there is no record evidence establishing that the foremen attend management meetings.

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that Section 2(11) if the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but, rather, requires a significant degree of independent judgment. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). In addition, the burden of proving supervisory status is on the party alleging that such status exists. *Dean & DeLuca of New York, Inc.*, 338 NLRB 1046, 1047 (2003). Here, that burden is on the Employer. Supervisory status must be proven and conclusory evidence will not satisfy the burden of proof. *Lynwood Manor*, 350 NLRB 489 (2007). As a general principle, the Board has exercised caution not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

B. Assign

"Assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee", as well as "designating an employee to a place (such as a location, department, or wing), [and] appointing an employee to a time (such as a shift or overtime period)." *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). However, every instruction in the workplace is not an assignment; "significant overall duties" do not include "ad hoc instructions to perform discrete tasks;" these are instructions are considered "direction" of a non-supervisory nature. *Id.* Similarly, working assignments made to equalize work among employee's skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment. *Providence Hospital*, 320 NLRB 717, 727, 731 (1996), *overruled in part by Oakwood Healthcare*, 348 NLRB 686, 686, fn.29 (2006).

The Board has defined the statutory term independent judgment in relation to two concepts. As an initial matter, to be independent, the judgment exercised must not be effectively controlled by another authority. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently independent under the Act. *Id.* The mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. *Id.* The Board further found that the degree of discretion exercised must rise above the routine or clerical in order to constitute independent judgment under the Act. *Id.*

Here, the record establishes that the foremen do not set the shift/time or place/location of employees' work. Moreover, the overall nature of employees' duties (lineman work versus right of way work) is already determined by employees' permanent assignment to a particular crew and job. However, the Employer argues that the foremen assign employees their overall duties through the tailgate meetings and during the course of the work performed by their respective crews. Assuming that employees learn of their

“overall duties” at tailgate meetings and/or at the jobsite, the record reveals such assignments are mostly fixed and dictated by the Employer, administrative agencies, customers, and jobsite requirements themselves. Moreover, the tailgate meetings are a collaborative process and in significant part are perfunctory for the Employer’s experienced and small crews. Indeed, a consensus approach is utilized during the tailgate meetings as all participate and make recommendations. However, assignment of work through a consensus of those that will be affected by the assignment does not meet the additional criteria of independent judgment. *Hospital General Menonita v. N.L.R.B.*, 393 F.3d 263, 267 (1st Cir. 2004); *Edward St. Daycare*, 189 F.3d 40, 48 (1st Cir. 1999). In light of the above and the record as a whole, crew members’ overall duties are fairly well decided without much input from the foremen and what input is provided appears to lack independent judgment, particularly in view of the lack of concrete examples to support the Employer’s contentions that foremen assign overall duties to their respective crews.

Specifically, right-of-way foreman DeBates testified that the vast majority of the time, his right-of-way crew knows how to do the job and understands the work. He estimated that about 80% of the time, his crew knows what to do, and only about 20% of the time do they need instruction about what to do. Likewise, according to Myers, the journeyman linemen do not need specific instruction about how to do the job, and estimated that about 20-25% of their work is so familiar it does not require any instruction. Myers further testified that the tailgate meetings will typically address any unique issues to the job. In addition, Myers testified that sometimes his crew will select the tasks that they ultimately perform.

The record further reveals that the foremen rotate overall tasks among the crews to vary their work and equalize their burdens. Further, most of the projects involve tasks which are recurrent and predictable, which lend themselves to routine rotations.

With respect to overtime, the record similarly lacks evidence to establish that the foremen use independent judgment to grant employees overtime. The record indicates that the foremen have virtually no role in granting overtime when employees are working on-call or when there are scheduled outages. When the foremen may authorize overtime after hours, the record reveals the foremen will ask their crews if they are willing to work late to finish the job. It is well established that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that certain action be taken; supervisory authority is not established where the putative supervisor merely has the ability to request that a certain action be taken. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006), citing *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001). Further, the extent of any overtime was not detailed in the record by testimony or payroll records. In light of the record evidence, I find that the Employer has failed to establish that the foremen exercise independent judgment in assigning overtime.

In sum, the record reveals insufficient evidence to establish that the foremen do more than issue ad hoc instructions to perform discrete tasks. In light of the above and the record as a whole, I find that the Employer has failed to establish that the foremen possess the authority to assign employees.

C. Responsibly Direct

The Employer asserts that the right-of-way foreman and the line foreman responsibly direct. The Board defined the statutory term “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be

undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible...and carried out with independent judgment." *Oakwood Healthcare*, 348 NLRB 686, 692 (2006). Further, with responsible direction, the Board said, "We agree with the circuit courts that have considered the issue and find that for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one performing the oversight if the tasks performed by that employee are not performed properly." *Id.* Thus, accountability is established where putative supervisors have the authority to take corrective action and are subject to adverse consequences for the performance of their staff. *Id.*

Regarding whether the foremen decide what job shall be undertaken next and who shall do it, DeBates, the current right-of-way foreman, testified that even though the skill set is fairly evenly matched among his crew, he assigns his crew members with daily tasks based on their skills as well taking into consideration what his crew members want to do or need to do to gain experience. However, DeBates testified that most of his directions to his crew come from specific consumer requests, Employer policies and procedures, and safety guidelines. However, DeBates' testimony reveals that about 20% of his crew's work involves requires instruction or direction.

Myers, the current line foreman, testified he also assigns line crew members with daily tasks based on the crew member's respective experience levels. Myers testified he attempts to provide the least experienced crew member, the apprentice lineman, with "up in the air" line work most of the time so he gains experience, and Myers rotates with the journeyman lineman to accompany the apprentice "up in the air." Myers further testified that when he does have to give directions to the crew, he assesses the experience level of the crew and their knowledge of the system. For example, Myers testified that one journeyman lineman has more seniority and more experience, so it is easier for Myers to describe the work and send him to accomplish it than to a less senior, less experienced crewmember. Myers also provided an example of choosing one employee over another to perform backhoe work based on Myers' observation of the way in which the chosen employee had operated a backhoe in the past relative to another crew member. Myers also testified only about 20 to 25% of his crew's work is so familiar that the crew does not require instruction or direction.

Gast, a journeyman lineman, testified that the line foreman decides who will do the work on the crew, what equipment will be used, and is responsible for the safety of the crew and seeing that the job is done correctly. Gast also testified that the crew takes turns going "up in the air," and that the journeyman linemen or foreman direct the apprentice lineman's work, since he needs the training and oversight.

Thus, the record supports finding that the foremen direct their crews' work, as they have crews under them, and the foremen decide what job shall be undertaken next or who shall perform work when issues arise over task assignments. Further, such direction is carried out with independent judgment, because the foremen direct their respective crews free from the control of others and exercise discretion based on factors such as crew member desires, experience, skill, knowledge of the system, training opportunities, and/or proficiency at operating particular equipment. Although the record reveals that there are a number of policies with which foremen must ensure compliance, they do not abrogate the foreman's discretion to decide what job shall be undertaken next, who shall do it, or change those foremen's directions as needed -- Myers' testimony in this regard is clear.

Furthermore, the record is replete with testimony that the foremen's directions are made in a context where they must assess and insure safety. In this regard, the record reveals that the crews are performing dangerous jobs on a frequent and regular basis, dealing with power lines, heavy equipment, working "up in the air," and the very real possibility of serious or even fatal accidents caused by, for example, electrocution or falling trees.

The record further reveals sufficient evidence to establish that both foremen are held accountable for the performance of their crews. Indeed, the record contains concrete examples and documentary evidence with respect to evaluations of the foremen and significant discipline of right-of-way foreman DeBates by the Employer to establish that it truly holds the foremen accountable or responsible for the direction of their crews. While not conclusive, the job foremen's respective job descriptions also accurately set forth foreman duties and responsibilities concerning the direction of work. Specifically, both foremen's position descriptions state that they are responsible for the quality and quantity of all work performed or handled by subordinate employees.

As for discipline, the record specifically reveals that around June 24, 2008, the right-of-way foreman DeBates was issued a 1st Written Warning regarding an injury accident that occurred to DeBates due to a crew member cutting a tree which fell on DeBates. The record reveals that the crew member also received a written warning for the accident caused by the crew member. I recognize the time lag for the discipline issued to DeBates and that it follows an adverse OSHA investigation/finding concerning the Employer and/or DeBates' conduct. Thus, one could view the warning as only a result of OSHA's involvement and, thus, an anomaly. However, conversely, the lack of Employer warnings issued to the foremen could just as easily be reflective of the safe, effective and efficient fashion in which the foremen have performed their work over the years. Regardless, the fact remains, the Employer issued the warning to DeBates in line with the responsibilities the Employer has clearly delegated to the foremen.

Regarding evaluations, the record specifically discloses a July 9, 2009, job evaluation for right-of-way foreman DeBates, which states that DeBates is a "good crew leader" and that "work is always well lined out by Kevin [DeBates]." DeBates also testified his performance is reviewed annually by the Operations Manager, including evaluations of the quality of the work his crew produces, his crew's safety practices, his handling of customer complaints, and of his resolution of problems among his crew. In addition, the record has an August 10, 2009, job evaluation for line foreman Myers, which states that Myers should "continue to grow in crew leadership," should "work on being candid with crew members to improve performance," that he should "continue to improve on the work planning process, laying out work in advance," and that "Kris [Myers] enjoys running the crew." Myers also testified he gets evaluated annually by the Operations Manager, regarding how well he is performing the duties outlined in his position description.¹⁹

¹⁹ I note that the record lacks any concrete evidence showing that the line foreman has actually suffered adverse consequences for failing to properly direct his crew. However, Myers has only occupied the line foreman position for 2 ½ years and the lack of any discipline against him for directing his crew could just as easily be a testament to the quality of his responsible direction, and the emphasis he places on safety, particularly given the dangerous and potentially fatal nature of their work involving servicing electrical lines.

On the issue of safety, the record clearly reveals that the work performed by the crews is fraught with danger, that the Operations Manager rarely visits the job site, and that the Employer holds the foremen responsible for directing their respective crews in an effective, efficient, and most importantly, in a safe fashion. In carrying out their responsibilities, the record further reveals that foremen exercise independent judgment in issuing directions to their crewmembers by factoring in work desires and relative skills or experience demanded by the work at hand.

While I recognize the work crews are relatively small, I also clearly recognize, as noted above, that the work performed by the crews is dangerous. Given the record evidence, it is not a stretch here to conclude that the foremen possess the authority to responsibly direct employees who perform work of a highly dangerous nature requiring significant skills, training, experience and necessary oversight. In light of the above and the record as a whole, I find that the Employer has met its burden of establishing that the foremen possess the authority to responsibly direct as set forth in Section 2(11) of the Act.²⁰

D. Evaluate

The Employer asserts that the foremen have authority to evaluate employees. However, Section 2(11) of the Act "does not include 'evaluate' in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employees being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Harborside Healthcare*, 330 NLRB 1334, 1334 (2000). See also *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999).

In this case, the record shows that both the right-of-way foreman and line foreman are responsible for evaluating their crews' performance. However, the record does not show whether their evaluations would be used by the Employer to impact the wages and/or job status of evaluated crew members. Similarly, the record does not disclose whether DeBates' or Myers' comments to management on employees' performance may have any effect on those employees' wages and/or job status. In light of the above, the absence of concrete examples, and the record as a whole, I find that DeBates' and Myers' roles in evaluations do not rise to the level of supervisory authority as that term is defined in Section 2(11) of the Act.

E. Approving or Denying Leave Requests

The Employer argues that the foremen possess the authority to approve or deny leave requests. The Board has long held that the power to grant time off to employees is indicative of supervisory authority. *HS Lordships*, 274 NLRB 1167, 1174 (1985) (citations

²⁰ Petitioner cites *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006), for the proposition that even though the lead persons in that case faced adverse consequences for not providing proper oversight, the employer failed to prove that the lead persons' responsible direction of employees was exercised with independent judgment and involved a degree of discretion that rose above the "routine and clerical." Unlike the lead persons in *Croft*, the foreman here do exercise responsible direction with independent judgment as detailed above, since the foremen issue their crew directions free from the control of others and exercise discretion, based on factors such as crew member experience, skill, knowledge of the system, training opportunities, and proficiency at operating particular equipment. Further, as highlighted above, the direction from the foremen and assessment of safety is particularly pivotal here, unlike the lead persons in *Croft*, given the dangerous tasks the Employer's crews perform on a daily basis, and given the real possibility of serious or even fatal accidents.

omitted). The record reveals that, with the exception of requests for family leave that must be approved by the General Manager, both foremen have the authority to grant or deny leave requests without getting approval to do so, signing such requests as the “supervisor” of the employee. The record is clear that the Operations Manager and HR Manager play some role regarding the leave requests after the foremen approve or deny them, but fails to detail the nature and extent of their respective roles.

As for denying leave requests, DeBates testified he might have to deny leave requests for scheduling or safety reasons. Myers testified that the factors he uses to determine whether to approve or deny a leave request include the crews’ job schedules and whether or not the crew needs the person available for the period requested. However, the record contains no concrete evidence of the foremen exercising their purported discretion regarding approving or denying leave requests or that either foreman has actually denied any leave requests. Thus, there is insufficient evidence to warrant finding that the foremen use independent judgment in granting or denying time off. In light of the above and the record as a whole, I find that the roles held by the line foreman and right-of-way foreman with respect to approving or denying their crew’s leave requests do not constitute supervisory authority under Section 2(11) of the Act.

F. Effectively Recommending Hire, Discipline, Discharge²¹

1. Legal Standards

The Employer argues that the foremen possess the authority to effectively recommend hire, discipline, and discharge. Persons with the power “effectively to recommend” the actions described in Section 2(11) are supervisors within the statutory definition. See *e.g.*, *Entergy Systems & Service*, 328 NLRB 902 (1999). Where recommendations are not shown to be effective or do not result in personnel action being taken without resort to individual investigation by higher authority, supervisory status is not established. *Mower Lumber Co.*, 276 NLRB 766 (1985). The Board has rejected the contention that mere suggestions are effective recommendations and that signatures on a discipline form amounted to an effective recommendation. *Brown & Root, Inc.*, 314 NLRB 19 (1994). The Board has also held that the mere issuance of a directive to alleged supervisors setting forth supervisory authority is not determinative of their supervisory status. *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). Individuals must have been notified of their authority if they are to be supervisors. *Volair Contractors, Inc.*, 341 NLRB 673 (2004). However, individuals who possess supervisory authority can be held to be supervisors even if the authority has not yet exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 fn. 8 (2001).

Here, the foremen’s job descriptions, documented warnings, and record testimony reveal that the foremen do have some role in recommending hire, discipline, and discharge. Among other things, both foremen’s job descriptions state they are responsible for: interviewing applicants for job openings and making recommendations to the Operations

²¹ As noted earlier, with respect to Myers, the record reflects that he has not been involved in any part of hiring, has never been told by management what, if any, responsibility he has for hiring, has never made a recommendation to hire or discharge, and has not been involved or recommended any discipline. Myers testified that he has no independent authority to suspend or discipline, and that he can only make recommendations. As previously mentioned, Myers has only occupied his foreman position for 2 ½ years and in that time, the Employer’s workforce has been stable.

Manager regarding final selection, and continually evaluating performance of subordinates and for making recommendations regarding training or replacement of employees with performance issues.

2. Hire

The record reveals that right-of-way foreman DeBates has been involved in interviews for two hires, as a member of a four-person interview panel, with equal weight given to each interview panel participant's recommendation. However, the record fails to provide any evidence regarding whether the panel's and/or the foreman's hiring recommendation is followed without any independent investigation from the hiring decision-makers, as there is no dispute that the ultimate decision for hiring is made by management above the foremen. Indeed, the record lacks evidence detailing the roles of the General Manager, Operations Manager, and HR Manager following the panel's recommendation to hire. Thus, I find that the foreman do not possess the authority to effectively recommend hire.

3. Discipline

With respect to discipline, the record contains only one document pertaining to actual discipline of an employee other than the right-of-way foreman. That document shows that DeBates signed a written warning dated December 30, 2002, as "supervisor." That warning was issued, at the direction of the Operations Manager, to a crew member for reporting to work late. However, the General Manager testified that DeBates signed another written warning as "supervisor" since 2003, but the record contains no specific evidence regarding the post 2003 discipline. While DeBates testified that he has the authority to discipline or suspend employees without approval from anyone else, the record does not provide concrete examples showing what if any discretion is involved with such authority. For instance, does Employer require DeBates to issue a warning for a late arrival regardless of whether an employee is a minute late or hours late? Moreover, the General Manager testified that he reviews all discipline before it is issued; yet, the record reveals no evidence of the factors he takes into consideration regarding his review of discipline, or whether he engages in any independent investigation or whether he generally follows the recommendation of his subordinates. Thus, the Employer has failed to carry its burden of establishing that the foremen effectively recommend discipline.

4. Discharge

As for discharge, the record discloses that only one employee, R.N., has been terminated from either crew since the current General Manager started in 2003. However, DeBates had recommended R.N.'s discharge long before the Employer ultimately decided to terminate R.N. Indeed, the Employer continued to employ R.N. for some time following Debate's discharge recommendation. Further, the Employer did not submit any documentation of R.N.'s discipline or eventual discharge into the record, and the roles of the Operations Manager and the General Manager in R.N.'s eventual discharge are similarly not detailed in the record. In sum, the record reveals insufficient evidence to support the Employer's position that the foremen possess the authority to effectively recommend discharge.

5. Conclusion

In sum, the Employer failed to meet its burden of establishing that the foremen possess authority to effectively recommend hire, discipline, or discharge. While I recognize

that such details may appear to be burdensome to a party alleging supervisory status, I also recognize that these burdens are justified as a finding of supervisory status removes an individual from the protection of the Act. Accordingly, a lack of concrete evidence is construed against the party asserting supervisory status. See *Elmhurst Extended Care Facilities*, 339 NLRB 535 fn. 8 (1999).

G. Adjusting Grievances

As noted above, the General Manager testified that the Employer's procedure for employee complaints is for employees to first seek resolution from their supervisors. Therefore, according to the General Manager's conclusory testimony, the crews should therefore go to the foremen with their complaints, and the foremen have the authority to resolve those complaints. As noted above, supervisory status must be proven and conclusory evidence will not satisfy the burden of proof. *Lynwood Manor*, 350 NLRB 489 (2007).

DeBates testified he has not participated in handling disputes between crew members and management and has never made any recommendation with respect to such disputes. Likewise, Myers testified that he was unaware of and did not participate in any disputes between his crew and management.

In sum, the record contains no examples detailing the foremen's purported independent judgment over any crew members' grievances and fails to set forth examples of any actual grievances adjustments in which the foremen played a role. Such a lack of concrete evidence is construed against the party asserting supervisory status – here, that is the construction is against the Employer's position that the foremen adjust or effectively recommend the adjustment of employee grievances. See *Elmhurst Extended Care Facilities*, 339 NLRB 535 fn. 8 (1999).

H. Secondary Indicia

Both parties raised issues involving secondary indicia. While secondary indicia may be relevant to supervisory status determinations, such indicia are not dispositive in the absence of a showing of one of the enumerated Section 2(11) criteria. *Training School of Vineland*, 332 NLRB 1412 (2000). However, because I have determined that the foremen possess one of the enumerated Section 2(11) indicia, namely the authority to responsibly direct, it is not necessary to separately analyze the secondary indicia.

IV. CONCLUSION

Based on the foregoing and the record as a whole, I find that the Employer has met its burden of establishing that the right-of-way foreman and line foreman possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. In particular, I find that the right-of-way foreman and the line foreman possess the authority to responsibly direct. However, I also find that the Employer has failed to carry its burden to establish that the foremen possess any additional indicia of supervisory authority.²²

²² The Employer cites several cases for the foremen's alleged supervisory authority, all of which I reject, for the reasons articulated above and based on the record as a whole. Specifically, the authority to evaluate employees' performance is not a Sec. 2(11) indicium; thus, as is the case here, "when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." Williamette

Accordingly, I shall direct an election in the following appropriate unit ("the Unit"):²³

All servicemen, journeyman linemen, apprentice linemen, groundsmen, brushers/groundsmen, engineering technicians/estimators, journeyman tree trimmers, tree trimmer apprentices, mechanic equipment operators, and groundskeepers employed by the Employer; excluding the operations manager, working right-of-way foremen (linemen), working line foremen, safety coordinator, office clerical employees, guards and supervisors as defined in the Act.

There are approximately 10 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **International Brotherhood of Electrical Workers, Local 659**.

A. List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with

Industries, 336 NLRB 743, 743 (2001) (quoting Elmhurst Extended Care Facilities, 329 NLRB 535, 536 (1999)). Authority to grant or deny time off is a secondary indicium of supervisory status. Sam's Club, 349 NLRB 1007, 1014 (2007). Absent primary indicia of supervisory status, secondary indicia are not dispositive. Training School at Vineland, 332 NLRB 1412, 1412-1413 fn. 3 (2000). Moreover, the foremen's role in processing time-off requests was limited to assessing staffing adequacy, a routine task that has not been established here to involve independent judgment. Pay differentials are likewise secondary indicia. The foremen's inclusion in training programs meant for foremen shows, at most, the Employer's belief that they were supervisors, but not their possession of supervisory authority. As for the foremen signing timesheets, these are clerical functions that merely confirmed employees' presence at work at particular times and did not involve independent judgment.

²³ Although Petitioner indicated in its brief that the issue is whether or not the unit sought by Petitioner is an appropriate bargaining unit, neither party is actually disputing the appropriateness of the unit. Rather, the issue is whether or not the disputed foremen possess indicia of supervisory authority as defined in Section 2(11) of the Act.

them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in Subregion 36 of the National Labor Relations Board, 601 SW 2nd Avenue, Suite 1910, Portland, Oregon 97204, on or before **November 5, 2010**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on the nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 12, 2010**. The request may be filed through E-Gov on the Board's web site, www.nlrb.gov,²⁴ but may not be filed by facsimile.

Dated at Seattle, Washington, this 29th day of October, 2010.

A handwritten signature in black ink, appearing to read 'Anne Pomerantz', is written over a horizontal line.

Anne Pomerantz, Acting Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

²⁴ To file a request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BLACHLY-LANE ELECTRICAL COOPERATIVE

Employer

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 659,
AFL-CIO

Petitioner

Case 36-RC-6496

DATE OF MAILING: October 29, 2010


AFFIDAVIT OF SERVICE OF *DECISION AND DIRECTION OF ELECTION*

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by facsimile and first-class mail to the following persons, addressed to them at the following addresses:

Blachly-Lane Electrical Cooperative
Bud Tracy, General Manager
90680 Hwy 99 N
Eugene, OR 97402-9624
(Employer)

IBEW Local 659
John Hutter, Organizer/Asst Bus. Mgr.
4480 Rogue Valley Hwy, Suite 3
Central Point, OR 97502
(Petitioner)

BULLARD LAW
Kenneth E. Jernstedt, Esq.
J. Kent Pearson, Jr, Esq.
1000 SW Broadway, Suite 1900
Portland, OR 97205
(Employer Counsel)


Shelley I. Sand, Secretary

Subscribed and sworn to before me

on October 29, 2010

DESIGNATED AGENT:


NATIONAL LABOR RELATIONS BOARD